Supreme Court, U.S.
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No. 04-_____

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**IN THE SUPREME COURT**
**OF THE UNITED STATES**

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**Richard A. Eichinger,**
Petitioner,
v.
**Christel U. Eichinger,**
Respondent.

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**On Petition for Writ of Certiorari to the Supreme Court of the State of Indiana**

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Whether the Indiana Statutes, utilized to order child custody, revoke his right to equal protection of the laws, infringe upon his right to substantive due process, and interfere with his right to privacy in parental decisions under the Fourteenth Amendment of the United States Constitution.

Will this court conduct a judicial review of Indiana statutes that imply that interests have superseded rights? In this case, whether a child's interest can act to revoke a child's right to continue life parented by both their own parents. Absent a compelling interest, is a child's right to be parented paramount to any state interest, before the state can be authorized to determine what is in "the best interests of the child"?

What would you do if they came to take your children? Would you do nothing or would you seek justice?

## PARTIES

The caption on the cover contains the names of all parties. None of the parties is a corporation. See Rule 29.6.

## TABLE OF CONTENTS


Questions Presented for Review i

Parties ii

Table of Contents iii

Table of Authorities vi

Decisions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 1

A. Statement of Material Facts 2

B. Statement on Preservation Below of Federal Questions 3

1. *The trial court's treatment of the federal questions* 4
2. *The Court of Appeal of Indiana's treatment of the federal questions* 5
3. *The Supreme Court of Indiana's treatment of the federal questions* 8

REASONS FOR GRANTING THE WRIT 8

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT 8

A. Equal Protection Decisions grouped as reasons to grant this Court's cert 9

1. *Stanley v. Illinois* 9
2. *Glona v. American Guarantee Co.* 11
3. *Meyer v Nebraska* 12

B. Standard of Review for Fundamental Rights Cases grouped as reasons to grant this Court's cert 13

C. Substantive Due Process Decisions grouped as reasons to grant this Court's cert 18

D. Privacy Decisions grouped as reasons to grant this Court's cert 20

E. Due Process Decisions with Respect To Interpretation grouped as reasons to grant this Court's cert 23

II. THE PETITION PRESENTS IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW THAT THIS COURT SHOULD RESOLVE 24

CONCLUSION 26

**Contents of the Appendix**


| | | |
|---|---|---|
| **A** | Order of the Supreme Court of the State of Indiana, *Eichinger, Richard v. Eichinger, Christel, Cause No. 02A04-0401-CV-00012 September 9, 2004* | a-1 |
| **B** | Order of the Court of Appeals of Indiana | a-2 |
| **C** | Order or Judgement of the Court, Allen Circuit Court | a-7 |
| **D** | U.S. Constitution: Fourteenth Amendment | a-10 |
| **E** | Constitution of the State of Indiana, Article 1, Section 1. Inherent rights | a-11 |
| **F** | Constitution of the State of Indiana, Article 1, Section 23. Equal privileges and immunities | a-11 |
| **G** | Indiana Code statute: **IC 31-17-2-8** | a-11 |
| **H** | Indiana Code statute: **IC 31-17-2-13** | a-12 |
| **I** | Indiana Code statute: **IC 31-17-2-14** | a-13 |
| **J** | Indiana Code statute: **IC 31-17-2-15** | a-13 |

## TABLE OF AUTHORITIES

***Federal Cases***


*Cipriano v. City of Houma*, 395 U.S. 701 (1969) 17

*City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) 17

*Dunn v. Blumstein*, 405 U.S. 330 (1972) 17

*Glona v. American Guarantee Co.*, 391 U.S. 73 (1968) 8, 9, 11

*Griswold v. Connecticut*, 381 U.S. 479 (1965) 15, 21

*Korematsu v. United States*, 323 U.S. 214 (1944) 16, 17

*Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) 14, 17

*Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) 12, 15, 16, 19, 22

*Personnel Administrator v. Feeney*, 442 U.S. 256 (1979) 16

*Quilloin v. Walcott*, 434 U. S. 246, 255 (1978) 14

*Roe v. Wade*, 410 U.S. 113 (1973) 15, 22

*Santosky v. Kramer*, 455 U.S. 745, 753 (1982) 13

*Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) 23

*Shapiro v. Thompson*, 394 U.S. 618 (1969) 14, 17

*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) 16, 18

*Solesbee v. Balkcom*, 339 U.S. 9 (1950) 24

*Snyder v. Massachusetts*, 291 U.S. 97 (1934) 24

*Stanley v. Illinois*, 405 U.S. 645 (1972) 8, 10, 13, 16

*Troxel v. Granville*, 530 U.S. 99-138 (2000) 13, 14, 19, 21

*Washington v. Seattle School Dist.*, 458 U.S. 457 (1982) 16

***State Cases***

*Gilchrist v. Gilchrist*, 75 N.E.2d 417 (Ind. 1947) 5

*Duckworth v. Duckworth*, 179 N.E.773 (Ind. 1932) 5

*Glover v. State*, 760 N.E.2d 1120, 1123 (Ind. Ct. App. 2002) 5

*Reilly v. Daly,* 6
666 N.E.2d 439, 445 (Ind. Ct. App. 1996)

*Pence v. Pence,* 7
667 N.E.2d 798, 800 (Ind. Ct. App. 1996)

*See also Matter of Joseph,* 7
416 N.E.2d 857, 861 (Ind. Ct. App. 1981)

***Constitutional and Statutory Provisions***

U.S. Constitution 4, 6, 11, 18, 19, 20, 23
Fourteenth Amendment

Indiana Constitution, Article 1, Section 1 4

Indiana Constitution, Article 1, Section 23 4

28 USC section 1257 1

INDIANA CODE STATUTE: **IC 31-17-2-8** 1, 9

INDIANA CODE STATUTE: **IC 31-17-2-13** 1, 10

INDIANA CODE STATUTE: **IC 31-17-2-14** 1

INDIANA CODE STATUTE: **IC 31-17-2-15** 1, 10

## DECISIONS BELOW

The Order or Judgment in the Allen Circuit Court is unpublished. App at a-7. The decision of the Indiana Court of Appeals is a Memorandum Decision – Not for Publication. App. at a-2. The Order of the Supreme Court of Indiana denying the Petition for Transfer of jurisdiction is unpublished. App. at a-1.

## JURISDICTION

The Order of the Supreme Court of Indiana denying the Petition for Transfer of jurisdiction was issued on September 9, 2004. No rehearing was requested and no extension of time to file this petition was requested. This Court has jurisdiction under Title 28 USC §1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

The following constitutional and statutory provisions involved in this case are set forth in the Appendix to the Petition: United States Constitution Fourteenth Amendment; Constitution of the State of Indiana, Article 1, Section 1; Constitution of the State of Indiana, Article 1, Section 23; Indiana Code statute: IC 31-17-2-8; Indiana Code statute: IC 31-17-2-13; Indiana Code statute: IC 31-17-2-14; Indiana Code statute: IC 31-17-2-15.

## STATEMENT OF THE CASE

The Supreme Court of Indiana upheld the constitutionality of a statute in which the state had unconstitutionally determined his children's best interest.

That determination, in this case, denied due process to these children by taking their fundamental rights to be raised, educated and socialized by both of their parents.

**A. Statement of Material Facts**

Heidi Anne Eichinger was born in Fort Wayne, Indiana, and therefore no state shall deprive her of life. She has a fundamental right to be raised, educated and socialized by both of her parents. Mystrahlen Adel Eichinger (herein below known as Mysti) was born in Annapolis, Maryland, and therefore like her sister, no state shall deprive her life and liberty without due process of law. Mysti has a unique genome. Her physical and emotional characteristics match those of her Mom and Dad more precisely than any other human, excepting her siblings. Hans Christoffer Eichinger was born in Westminster, Maryland, and therefore a US citizen, like his sisters. His genome contains long chains of DNA codes in cells that closely match the cells that live in his Mom and Dad. The cells that live in him will live in his children and theirs, so the lives of his Mom and Dad can propagate eternally.

Richard Alan Eichinger (herein below known as Dad) and Christel Utta Eichinger (herein below known as Mom) were married in Fort Wayne. Heidi was born prior to their marriage while Mysti and Hans were born during the marriage.

Dad can provide material facts describing his parent-child relationships because he has expert knowledge. Dad loves Heidi because she is his first-born daughter. Mysti is second but unique and most loved by Dad since she is born in the same month as him. Her strength of mind, perseverance and emotion-driven conviction mirror Dad's psyche. Hans is Dad's favorite son. Dad loves no son on

the planet more. Each relationship is life. Although Dad and Mom have dissolved their relationship to individuals separate and distinct, he knows that Mom too has a precious relationship with each of her children.

There is no dispute between the parties and Dad has at all times before, during and after his marriage supported his children in a comfortable, safe, healthy and secure manner.

**B. Statement on Preservation Below of Federal Questions**

It is self-evident that each parent-child relationship has a fundamental right to be lived once established. This inalienable right to live is a higher law than those legislated and adjudicated by government. Rights, such as these, transcend the authority of the state. This court has identified them as substantive. The authority of the state is limited. In cases such as these, due process requires strict scrutiny.

The federal questions presented in this Petition have first been raised in a Motion for Modification of Parental Responsibilities and Parenting Time to the trial court.

Dad's motion to modify was produced when he discovered that the state had unconstitutionally determined his children's best interest. That determination, in this case, denied due process to these children by taking their fundamental right to be parented by both of their parents. The state claimed to determine their interests and it did so by revoking their rights. In this case, there exists no state interest compelling it to revoke, interfere or infringe these person's fundamental rights.

Dad asserted that the statutes utilized to order child custody, violate his fundamental right to parent his children. These statutes are construed to preclude equal parenting when married parents dissolve their marriage.

The Constitution of the State of Indiana contains Bill of Right proscriptions for Inherent Rights and for Equal Privileges and Immunities. App at a-11. These are the State of Indiana's counterparts to the US 14th amendment.

Dad became increasingly aware of this court's treatment of substantive due process and it's interminable application of strict scrutiny whenever it seeks to uphold rights so precious.

These arguments were propounded throughout the state appellate briefings.

1. *The trial court's treatment of the federal questions*

In the trial court, Dad asserted that the allocation of parenting time and parental responsibilities and rights by the Court in its final Orders constitutes an unconstitutional infringement of his fundamental liberty interest in his family, and his rights under the Equal Protection and Substantive Due Process Clauses of the Fourteenth Amendment of the United States Constitution. The trial court denied Dad's motion. App. at a-7.

The trial court evinced a complete misapprehension of the gravamen of the challenge by citing cases where a compelling state interest existed.

The Trial Court cited two cases, Duckworth v Duckworth, 179 N.E.773 (Ind. 1932) and Gilchrist v Gilchrist, 75 N.E.2d 417 (Ind. 1947). Both cases were inapposite to the case presented to the Appellate Court. Both cases were brought before the Supreme Court of Indiana after years had passed and the family

circumstances had changed. At the time of their divorce, similar unconstitutional statutes were used to "award sole custody." Their fundamental rights to parent their children had been infringed at the times of their dissolutions of marriage.

In Gilchrist, Eileen sought to parent her son after her son's Dad died, after years of not parenting her son. In Duckworth, Richard Duckworth, sought to parent his son after his son's Mom died, again years after he had not parented his son. In both cases, the parents had neglected to parent their children for years after their divorces, probably for no fault of their own. In the interim, adoptive parents formed new parent-child relationships. A compelling state interest to preserve the best interests of the children existed. Both of the cases were inapposite to all cases where parents are separated by divorce. They served only as adequate examples of cases where a biological parent's right to parent is not absolute.

2. *The Court of Appeals of Indiana's treatment of the federal questions*

The Court of Appeals of Indiana affirmed. App. at a-3.

The Indiana Appeals Court cited Glover v. State, 760 N.E.2d 1120, 1123 (Ind. Ct. App. 2002) to assert their contention that Dad must rebut a presumption that all reasonable doubts must be resolved in favor of the statute's constitutionality.

The constitutionality of the Indiana statutes are challenged because of the assumptions they make with regard to the parent and children's rights. Dad did not question whether the words of the statute had conveyed to

the public a meaning that comports with the equal protection clause of the 14th amendment. There is not validity that is vague that must be resolved in favor of constitutionality. Rather, Dad requires judicial review of Indiana statutes that imply that interests have superseded rights. In this case, whether a child's interest can act to revoke a child's right to continue life parented by their own parents. A child's right to be parented is paramount to any state interest, absent a compelling one, before the state can be authorized to determine what is in "the best interests of the child".

A divorced parent is similarly situated to all other parents in that they have the same relationship with their children as any other parent. The statutes assume that the state has the authority to act as parent and determine what is in "the best interests of the child". The state has no such authorization when parents are fit to parent.

The Indiana Appeals Court cited Reilly v. Daly, 666 N.E.2d 439, 445 (Ind. Ct. App. 1996) to explain that it hadn't treated Dad differently from similarly situated parties, to the extent that the statutes operate evenhandedly in the context of child custody situations. Dad has argued that his substantive due process case was wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision.

Although, Dad is similarly situated to all the other fit parents who have had their rights infringed by these unconstitutional statutes, he also remains similarly situated to all the other parents who are not oppressed whether they are married, separated, or unwed. Dad has identical relationships to his children, as does any parent

with a parent-child relationship relating to their offspring. The appellate court has suggested that its creation of suspect classes titled "non-custodial parent" or "divorced parent" or "unwed parent", authorizes the state to act as parent. But, this court has consistently rebutted the State of Indiana's assumption. Dad stands as parent, in precisely the same situation as Mom, yesterday, today and tomorrow, forever and ever.

The Indiana Appeals Court cited Pence v. Pence, 667 N.E.2d 798, 800 (Ind. Ct. App. 1996) and Matter of Joseph, 416 N.E.2d 857, 861 (Ind. Ct. App. 1981) both cases are examples of situations where there exists a compelling state interest. Both cases cited were inapposite to the issue before the courts of Indiana.

In Pence, a parent that is in prison is unable to provide care, control and nurturing for their children. That parent neglects their child, and the state has a compelling interest to protect the rights of that child. In the Matter of Joseph, he was found to be a dependent and neglected child and declared a ward of the Department. Again, in order to protect the right of a child to live absent neglect or abuse, the state would be compelled to act as parent.

Both of these cases are examples of when the fundamental right to parent is not absolute. However, when fit parents assert their right to parent, the government is precluded from infringing unenumerated rights that are substantive.

In this case, the government of Indiana lacks even a legitimate state interest, to say nothing of a compelling one, to interfere with Dad's right to parent his kids.

3. *The Supreme Court of Indiana's treatment of the federal questions*

The Supreme Court of Indiana indicated in its order to deny transfer that it reviewed "the records, briefs and the decision of the Court of Appeals". It stated further that "Each participating member has had the opportunity to voice that justice's views on the case in conference with the other justices". And, "each participating member of the Court has voted on the petition". App. at a-1.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

The challenged statutory provision is functionally similar to the presumption of unfitness provision struck down by this Court in *Stanley v. Illinois*, 405 U.S. 645 (1972). Its operation is indistinguishable on any substantive basis from the legitimacy distinction for recovery for wrongful death struck down in *Glona v. American Guarantee Co.*, 391 U.S. 73 (1968). The decisions below upholding the challenged Indiana statutes squarely conflict with the decisions of this Court.

## A. Equal Protection Decisions grouped as reasons to grant this Court's cert

1. *Stanley v. Illinois*

The Appeals Court of Indiana wrote that the 'best interests test and the 'best interests' standard is a compelling state interest in the event of dissolution of that parent's marriage or when the parent has never married the other parent. The rationale for this imposition is that the state has an alleged interest in insuring that children of unmarried parents are adequately cared for. The implication in such a state act is that one parent would not otherwise adequately care for his or her child - that he would be derelict in his acknowledged duty of support and by logical extension unfit. The Court below concluded that such state imposition was constitutional. The judgment below clearly conflicts with this Court's cases.

*Stanley* involved a case of state statutory presumption of parental unfitness on the part of an unwed father without any proof of neglect, whereas the scheme at that time did not allow the state to assume custody of children of married or divorced parents or a single mother. This Court held that, pursuant to due process, the petitioner in *Stanley* was entitled to a hearing when the state proposed to take custody of his offspring and that denial of such a hearing violated his right to equal protection of the laws.
In the matter at hand, the challenged statute, while providing for a hearing, presumes that the best interests of the child are served by continuing a relationship with only one parent without any proof of neglect or unfitness. The statute IC 31-17-2-8 states, in pertinent part:

The court shall determine custody and enter a custody order in accordance with the best interests of the child.

And, the statute IC 31-17-2-13 states:

The court may award legal custody of a child jointly if the court finds that an award of joint legal custody would be in the best interest of the child.

And, the statute IC 31-17-2-15 states:

> In determining whether an award of joint legal custody under section 13 of this chapter would be in the best interest of the child, the court shall consider it a matter of primary, but not determinative, importance that the persons awarded joint custody have agreed to an award of joint legal custody.

This requirement that 'persons awarded joint custody have agreed' is equivalent to this Court in *Stanley* allowing the State of Illinois to *presume* the unwed father to be unfit and to force him to prove his fitness. Such an outcome - in either *Stanley* or Indiana's child custody determination - is anathema to this Court's long history of championship of equal protection.

The absence of marriage is not an impediment to the recognition of the fundamental right of the parent-child relationship:

> Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful-death action for the death of their mother,

> emphasizing that [405 U.S. 645, 652] such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit. Levy v. Louisiana, 391 U.S. 68, 71 -72 (1968).

2. *Glona v. American Guarantee Co.*

The lower courts have identified several classifications for parents, among these are unmarried, married, divorced, custodial, non-custodial and parents that agree. The mandate of the challenged statutes for child custody determinations create a legal line in the sand between married parents and those who have ceased to be or who chose not be married. However, this Court has rejected such an artificial distinction in cases involving family relations. In *Glona v. American Guarantee Co.,* 391 U.S. 73, 75, (involving a claim for damages for wrongful death of an illegitimate son, denied by the State of Lousiana), this Court stated:

> To say that the test of equal protection should be the "legal" rather than the biological relationship is to avoid [391 U.S. 73, 76] the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such "legal" lines as it chooses.

This Court upheld the right of the mother to recover for the death of her illegitimate son, rejecting the notion that only parents of "legitimate" children could so recover under state law, and affirmed that any such distinction was a violation of the Equal Protection Clause of the Fourteenth Amendment.

However, it is just such a distinction, which the challenged statute does, in fact, create. The statute treats unmarried parents as having no right to determine the precise nature of the care and nurturing of their offspring, substituting instead the combined and tabulated wisdom of the state legislature to establish that care, whereas the state does not interfere with the equivalent care and nurture of children provided by married parents without a showing of a compelling interest.

3. *Meyer v. State of Nebraska*

The Constitutional right to be a parent has long been recognized by this the highest Court in the land. As long ago as 1923, this US Court, in a case involving the right to teach in a foreign language, held:

> One claim put forward is, that the statute [prohibiting teaching in a foreign language] forwards the work of Americanization. But in our desire for the Americanization of our foreign born population we should not overlook the fact that the spirit of America is liberty and toleration -- the disposition to allow each person to live his own life in his own way, unhampered by unreasonable and arbitrary restrictions.
>
> The law, as construed by the Supreme Court of Nebraska, operates to deny the plaintiff in error the equal protection of the law. *Meyer v. State of Nebraska*, 1923.SCT.40447; 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923)

**B. Standard of Review for Fundamental Rights Cases grouped as reasons to grant this Court's cert**

That family relations comprise a protected liberty interest is well established and settled law:

The liberty interest at issue in this case -- the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court.
*Troxel v. Granville*, 530 U.S. 57, 66 (2000).

And,

Discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"
*Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

And this liberty interest is to be accorded the greatest respect:

> It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements". *Stanley v. Illinois*, 405 U. S. 645, 651 (1972), citing Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)

And is a protected interest:

We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected...

*Quilloin v. Walcott*, 434 U. S. 246, 255 (1978).

There must exist a compelling state interest before the state can impair fundamental rights, even in the face of apparent statutory empowerment to the contrary, as evidenced by the fact that the standard of review of such a decision is one of strict scrutiny:

> Consequently, I agree with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case. Our decision in Pierce v. Society of Sisters, 268 U. S. 510 (1925), holds that parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them. The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights. Here, the State of Washington lacks even a legitimate governmental interest -- to say nothing of a compelling one -- in second-guessing a fit parent's decision regarding visitation with third parties. On this basis, I would affirm the judgment below.
> *Troxel*, supra, at 75, Thomas, J. concurring.

This principle was enunciated unequivocally in Roe v. Wade, infra:

> Where certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest," Kramer v. Union Free School District, 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634

(1969), Sherbert v. Verner, 374 U.S. 398, 406 (1963), and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. [Citations omitted.]
*Roe et al. v. Wade*, 973.SCT.40394 ; 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973)

Roe drew on a long heritage of U.S. Supreme Court holdings that the state must demonstrate a "compelling interest" to justify infringement of fundamental rights. In Griswold v. Connecticut, infra, that Court held:

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling," Bates v. Little Rock, 361 U.S. 516, 524. The law must be shown "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." McLaughlin v. Florida, 379 U.S. 184, 196. See Schneider v. Irvington, 308 U.S. 147, 161.
*Griswold et al. v. Connecticut*, 1965.SCT.40818 ; 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)

This Court, in Stanley, examined much prior authority to establish the fundamental nature of parental rights:

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390, 399 (1923), "basic civil

> rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), and "[r]ights far more precious . . . than property rights," May v. Anderson, 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, at 399, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring). *Stanley*, supra, at 651.

The State of Indiana has created a non-custodial class of parents, those parents whose marriage is dissolved must fulfill their obligations and commitments to their children as ordered by the Court. This legislatively created class is every bit as suspect as that based on race (*Korematsu v. United States*, 323 U.S. 214, 216 (1944), applying "rigid scrutiny"; *Personnel Administrator v. Feeney*, 442 U.S. 256, 272 (1979), "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification"; quoted in *Washington v. Seattle School Dist.*, 458 U.S. 457, 485 (1982)).

The Court of Appeals of Indiana - upheld by the Supreme Court Indiana by its denying transfer - applied the *least* rigorous standard of review of Petitioner's constitutional challenge to the statute.

However, as far back as World War II, in *Korematsu* this Court recognized that classifications which infringe upon fundamental civil rights are subject to 'rigid' scrutiny:

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.
> *Korematsu,* supra, at 216.

> The civil rights of parents to the care, custody, management and nurture of their children deserve no less deference and protection. The rights, which the Petitioner asserts are being violated, all constitute universally recognized fundamental rights, as they are all embodied in the Federal and/or State Constitutions. Whenever a state would attempt to infringe such fundamental rights in favor of a "state interest," that interest must be compelling (*Shapiro v. Thompson*, 394 U.S. 618, 627 , 634, 638 (1969); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Dunn v. Blumstein*, 405 U.S. 330 (1972)) and the standard of review is one of strict scrutiny (*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

The lower Court applied an inadequate standard of review, and this Court cannot countenance the state's

treatment of a parent differently simply because he is no longer or has never married the other parent.

### C. Substantive Due Process Decisions grouped as reasons to grant this Court's cert

Indiana statutes that determine "the best interests of the child" unconstitutionally infringe on unenumerated rights. Parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them. Judicial discretion tempered by arbitrary determinations of exactly what constitutes "the best interests of the child" is fraught with capricious orders unconstitutionally infringing upon basic human rights. One of the most basic building blocks of a civilized society and the most fundamental, unenumerated, inalienable and precious rights is that of fit parents to parent their children and for those children to be parented by both of their parents. Protecting children from harm, such as when children are neglected or abused, is one of the only compelling state interests that rise to a level authorizing a governmental unit to act. The lower courts, in this substantive due process case, wrongly considered the original understanding of the Due Process Clause because the appropriate standard of review is strict scrutiny to infringements of fundamental rights under the US 14th Amendment.

The Constitutional right to be a parent has long been recognized by this Court. The precious right to parent your own children is a "fundamental right". What constitutes a "fundamental right", especially as that concept relates to family relationships, is well established in American jurisprudence.

Moreover, this court has decided that the "compelling state interest" or the "process of effecting that which is in the best interests of children" alluded to by the Trial Court cannot trump a parent's right to parent his own children:

> It is apparent, then, that the case we are now considering involves two areas (adoption and the welfare of children) which are peculiarly within the province of legislative action. Balanced against this area of primary State concern is the right of a parent to the custody of her child, which has been recognized as a right encompassed within the protection of the fourteenth amendment which "may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."
> *Meyer v. Nebraska,* 262 U.S. 390, 399-400, 67 L.Ed. 1042, 1045, 43 S.Ct. 625, 627. Regenold v. Baby Fold, Inc., 369 NE 2d 858; 68 Ill 2d 419, appeal dismissed 98 S Ct 1598, 435 US 963, IL, (1977).

In *Troxel v. Granville*, supra, 99-138, this Court stated:

> The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." Washington v. Glucksberg, 521 U. S. 702, 719 (1997). The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and

liberty interests." Id., at 720; see also Reno v. Flores, 507 U. S. 292, 301-302 (1993).

This Court went on to reiterate that a parent's "care, custody and control" of children was one of the oldest fundamental liberty interests recognized here. The Court cited a long line of its own cases and came to the conclusion that, "In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." The right to the care, custody and control - and by a very short extension of logic, the right to *self-determination* in that care - is not forfeited by a parent by the mere occurrence of divorce or having a child born out of wedlock. If that were so, then the rights so carefully scrutinized and declared by this Court would not be "fundamental" at all, but rather mere grants of privilege by the state, removable at the whim of the state.

**D. Privacy Decisions grouped as reasons to grant this Court's cert**

Justice Louis Brandeis, in a quote famously attributed to him, described privacy as "the right to be let alone."[1]

To avoid state impairment of parental rights, one need only be a "fit" parent:

> Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be

[1] *The Right of Privacy*, Warren and Brandeis, Harvard Law Review, Vol. IV, No. 5, December 15, 1890; quoting *Cooley on Torts*, 2d ed., p. 29 [p. 195 Note 4 in original].

> no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. See, e.g., [Reno v. ] Flores, 507 U. S. [292,] at 304.
> *Troxel et vir. v. Granville*, supra 67.

The criterion for "fitness" does not require that a parent conform to some arbitrary state-imposed definition or a set of characteristics for personality, wealth, gender, temperament or other individual trait, but only that one "adequately cares for his or her children." As long as one is fit in this regard, one is entitled to the full Constitutional protection of one's private liberty interest in family.

This Court has extended this right to privacy against government interference in personal spheres encompassing a protected liberty interest.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965) this Court found an independent right of privacy, derived from the confluence of several provisions of the Bill of Rights or discovered in the "penumbras" of these provisions, which was expounded upon by the Court and actually used to strike down a governmental restraint. ("The Connecticut statute forbidding use of contraceptives violates the right of marital privacy which is within the penumbra of specific guarantees of the Bill of Rights. Pp. 481-486.") It is self-evident that both government restraint as well as government compulsion, as in the challenged statute here - mirroring the concepts of prohibition and mandamus - are subject to Constitutional scrutiny.

This Court expounded numerous manifestations of personal privacy in *Roe v. Wade*, 410 U.S. 113 (1973):

> ...the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in ...the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U.S., at 484 -485 ...in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, 262 U.S. 390, 399 (1923). ...These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967); procreation, Skinner v. Oklahoma, 316 U.S. 535, 541 -542 (1942); ...family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), Meyer v. Nebraska, supra. *Roe, supra*, at 152.

The Indiana statutes revoke, restrict and constrain liberty interests denying a right to privacy by injecting government into the private realm of family.

**E. Due Process Decisions With Respect To Interpretation grouped as reasons to grant this Court's cert**

This Court has interpreted due different than the Appeals Court of Indiana especially while determining what is in the best interest of children.

In fact, however, procedural due process was never at issue in the case below. All due process claims were focused on the *substantive* component of due process. Inherent in the substantive due process clauses of the Fourteenth Amendment is the assumption that the law under which process is due is itself valid and constitutional, else "due process" becomes an empty shibboleth of the judicial class and not a bulwark against government tyranny.

There exists in the "law of the land" and the "due process clauses" of the state constitutions a restriction upon the substantive content of legislation, which prohibited, regardless of the matter of procedure, a certain kind or degree of exertion of legislative power altogether.

Thus, Chief Justice Taney was not innovating when in his opinion in the Dred Scott case he pronounced, without elaboration, that one of the reasons the Missouri Compromise was unconstitutional was that an act of Congress which deprived "a citizen of his liberty or property merely because he came himself or brought his property into a particular territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law." *Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857).

This Court has articulated the most profound and historical meaning of the protection of due process:

> It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply imbedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just.
> *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Justice Frankfurter dissenting).

> According to this Court, due process is violated if a practice or rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

A fundamental right to parent is a right to live and is most assuredly substantive.

## II. THE PETITION PRESENTS IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW THAT THIS COURT SHOULD RESOLVE

Ultimately, this petition presents a simple question of national importance.

All parents have a fundamental right to raise, educate and socialize their own children. But, the statutes of Indiana are laden with unconstitutional conditions. They purport the child's welfare to be paramount, not the child's right

to be parented by both parents. The separated parents must agree and cooperate before the state can preserve and protect the fundamental rights of other American citizens, namely their children. Parents that are separate, without joint interest must act in a joint manner or their children's fundamental rights are revoked. Parents, predominantly Dads, are declared non-custodial and denied an equal opportunity to parent their own children, denied a fundamental right solely for the purpose, if Dad were to guess, only to preserve the state's construct of a suspect class.

The right of a parent to determine for themselves the quality and nature of the upbringing of one's child are both fundamental, essential rights well anchored in the United States Constitution and the jurisprudential history of this Court.

The Indiana statutes utilized to determine child custody assume that parents in other than an intact marriage will be scofflaws with respect to the health, safety and economic security of their offspring. The statute directly restricts activities entitled to the utmost constitutional protection. While purporting to secure the state's interest in ensuring that children of divorce are adequately cared for, the statute does no such thing.

In the process of enforcing the statute, the state has created a highly suspect class of persons – non-custodial parents - that it then treats completely differently from custodial parents, despite the fact that *all* parents are similarly situated *with respect to their children.* It infringes the privacy of the family relationship and the right of the parent - and the child - to be free of arbitrary government intrusion in their personal affairs.

The constitutional injury that the Court of Appeals of Indiana - and by implication, in its denial of transfer, the Supreme Court of Indiana - have subjected a statute, the review of which should be made under the strictest scrutiny because the implicated rights are the most fundamental, to the least rigorous standard of review, as if the 'rights' in question were a division of marital property.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Indiana. On review, the judgment of that Court should be reversed and the challenged statutes held to be unconstitutional, void and have no further force or effect.

Respectfully submitted,

Richard Eichinger
PRO SE
28 Jefferson Street
Brookville, OH 45309
937-255-3808 x3189 (office)
*Petitioner*

December 8, 2004

# APPENDIX

## APPENDIX

**A** Order of the Supreme Court of the State of Indiana,

*Eichinger, Richard v. Eichinger, Christel, Cause No. 02A04-0401-CV-00012 September 9, 2004*

Supreme Court, State of Indiana
217 State House
Indianapolis, Indiana 46204

Lower Court Number:
02C01-9903-DR-259

Eichinger, Richard -v- Eichinger, Christel

You are hereby notified that the Supreme Court has on this day 9/09/04

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction following the issuance of a decision by the Court of Appeals. The petition was filed pursuant to Appellate Rule 57. The Court has reviewed the decision of the Court of Appeals. Any record on appeal that was submitted has been made available to the Court for review, along with any and all briefs that may have been filed in the Court of Appeals and all of the materials filed in connection with the request to transfer jurisdiction. Each participating member of the Court has voted on the petition. Each participating member has had the opportunity to voice that justice's views on the case in conference with the other justices.

Being duly advised, the Court now denies the Appellant's Petition to Transfer of jurisdiction.

Randall T. Shepard, Chief Justice

All justices concur. MS

Witness my name and the seal of said Court, this 9th day of September, 2004

David C. Lewis

Clerk, Supreme Court, Court of Appeals and Tax Court

## B Order of the Court of Appeals of Indiana

Richard Eichinger, Appellant-Respondent, vs. Christel Eichinger, Appellee-Plaintiff.
No: 02A04-0401-CV-12

Appeal from the Allen Circuit Court
The Honorable Thomas P. Boyer, Special Judge
Cause No. 02C01-9903-DR-259

May 7, 2004
Memorandum Decision – Not for Publication
Darden, Judge

Seal of the Clerk the Supreme Court, Court of Appeals and Tax Court, filed May 7, 2004

## STATEMENT OF THE CASE

Richard Eichinger appeals the denial of his Motion for Modification of Parental Responsibilities and Rights and Parenting Time.

We affirm.

## ISSUE

Whether Richard has met his burden to show that Indiana Code Section 31-17-2-8, which authorizes the trial court to determine custody and enter a custody order in accordance with the best interest of the child is unconstitutional.[1]

## FACTS

In March 2001, the trail court dissolved the marriage of Richard and Christel Eichinger and awarded sole custody of their children to Christel. Richard was awarded parenting time with the children pursuant to the terms and conditions of the Allen County Standard Visitation Order with certain modifications.

[1] Richard also argues that Indiana Code Sections 31-17-2-13 and 14 are unconstitutional. Section 13 provides that "[t]he court may award legal custody of a child jointly if the court finds that an award of joint legal custody would be in the best interest of the child." Section 14 provides that "[a]n award of joint legal custody under section 13 of this chapter does not require and equal division of physical custody of the child." Richard's specific arguments, however, do not address these statutes. We therefore confine our analysis to whether Richard has met his burden of proof to show the unconstitutionality of section 8.

In April 2003, Richard filed a Motion for Modification of Parental Responsibilities and Rights and Parenting Time, wherein he argued that the dissolution decree and custody order should be vacated because Indiana Code Sections 31-17-2-8, 13 and 14, all relating to child custody, are unconstitutional. The trial court denied Richard's motion and he appeals.

## DECISION

At the outset, we note that Christel has declined to file an appellate brief. When an Appellee fails to file an appellate brief, we apply a less stringent standard of review. In re Adoption of R.L.R., 784 N.E.2d964, 968 (Ind. Ct. App. 2003). We may reverse if the appellant establishes prima facie error. Id. Prima facie error is error at first sight, first appearance, or in the face of it. Id. The purpose of this rule is not to benefit the appellant, but to relieve the court in proper circumstances of the task of controverting the appellant's arguments and contentions, a burden that most appropriately rests with the Appellee. Halliday v. Auburn Mobile Homes, 511 N.E.2d 1086, 1088 (Ind. Ct. App. 1987). However, the court is vested with the discretion to consider the appellant's contentions and decide the case on the merits when the appellant has made the requisite showing of prima facie error. Id. Where we can address the merits without the aid of an Appellee's brief, we will do so. Id. Such is the case before us today.

Richard argues that the Indiana Code Section 31-17-2-8 is unconstitutional. Specifically he claims that the child custody statute that authorizes the trail court to determine the custody and enter a custody order in accordance with the best interests of the child violates his constitutional

rights to equal protection and substantive due process.[2] When the validity of a statute is challenged, the reviewing court begins with a presumption of constitutionality.

Glover v. State, 760 N.E.2d 1120, 1123 (Ind. Ct. App. 2002), trans. denied. The burden to rebut this presumption is upon the challenger, and all reasonable doubts must be resolved in favor of the statute's constitutionality. Id.

A. Equal Protection

Richard first contends that the Indiana Code Section 31-17-2-8 violates his right to equal protection because he is treated "differently from a married parent with respect to his freedom to raise his children and to cho[o]se who educates and socializes them." Appellant's Brief, p. 7. The Equal Protection Clause of the Fourteenth Amendment prohibits states from treating similar situated individuals differently. Reilly v. Daly, 666 N.E.2d 439, 445 (Ind. Ct. App. 1996), trans. denied. It does not require that all persons be treated either identically or equally. Id. at 445-46. Rather, equal protection analysis is implicated only if an individual has been treated differently from similarly situated persons. Id. at 446.

Here Richard has failed to set forth any argument as to

[2] Richard also argues that the statute violates his constitutional right to privacy. However, in his cursory argument, Richard has failed to present any cogent analysis on this issue or cite any relevant authority. Richard has therefore waived appellate review of this issue. See Ind. Appellate Rule 46(A)(8)(a); Olcott International and Company, Inc v. Micro Data Base Systems, Inc., 793N.E.2d 1063, 0168 (Ind. Ct. App. 2003), trans. denied.

how the challenged statute operates to treat him differently from similarly situated parties. To the extent that the statue operates evenhandedly in the context of child custody situations, there is no unequal treatment and Richard has failed to rebut the statute's presumed constitutionality.

B. Substantive Due Process

Richard next contends that Indiana Code Section 31-17-2-8 "unconstitutionally infringes on his fundamental right to raise his children." Appellant's Br., p. 15. Specifically he complains that the "so-called 'best interests of the child' statute has been utilized by the court to effective terminate [his] parental rights, when there was absolutely no finding that he was unfit as a parent." Appellant's Br., p. 15.

The Fourteenth Amendment due process clause recognizes a fundamental right to family integrity. Pence v. Pence, 667 N.E.2d 798, 800 (Ind. Ct. App. 1996). A fundamental right to family integrity means that our federal constitution, as a matter of substantive due process, protects the private ordering of interpersonal relationships from state intrusion. Id. State interference may be justified only by a compelling state interest. Id.

In Pence, this court found that the best interests test set forth in the visitation statute constituted a compelling state interest that justified the resultant interference with the rights of the biological parents. Id. See also Matter of Joseph, 416 N.E.2d 857, 861 (Ind. Ct. App. 1981) ("[T]he decisions of this state reveal the 'best interests' standard has not been employed to make vague moral judgments about alternative lifestyles and parental fitness.

Instead, the process of effecting that which is 'in the best interests of the child' has in fact been an effort by our courts to preserve, and in some instances create, an environment which, to the extent possible, meets the 'need of every child for unbroken continuity of affectionate and stimulating relationships with an adult.' As such, the 'best interests' test without question

COMES NOW Petitioner, Christel U. Eichinger, in person, and by counsel, Daniel L. Lauer, and Respondent, Richard A. Eichinger, in person. A hearing is held on Respondent's Motion For Modification Of Parental Responsibilities And Rights And Parenting Time, filed April 14, 2003. The Court being duly advised in the premises now FINDS, ORDERS, ADJUDGES AND DECREES:

1. The Court takes judicial notice of the prior findings and orders in this matter.

2. On March 27, 2001, the Court entered a Decree Of Dissolution Of Marriage with respect to the parties. In the Decree, the Court entered certain orders regarding custody and parenting time (visitation) with respect to the parties' minor children and Respondent was granted parenting time with the children pursuant to the terms and conditions of the Allen count Standard Visitation Order with certain modifications.

3. Respondent had not presented any evidence with respect to modification of the aforesaid custody and parenting time orders, but rather contends that the orders should be vacated based upon his contention that I.C. 31-17-2-8, I.C. 31-17-2-13, and I.C. 31-17-2-14 are unconstitutional.

4. The custody and parenting time orders in this case were entered on March 27, 2001. The time frame for challenging these orders by way of a Motion To Correct Errors or by way of an appeal has expired.

5. The cased cited by Respondent do not support his contention that the aforesaid statutes are unconstitutional. It has long been recognized that a parent's custodial rights are not absolute, and the State has a compelling interest in custody proceedings.

6. In Duckworth v. Duckworth, 179 N.E.773 (Ind. 1932), the Indiana Supreme Court state as follows with respect to the State's interest in a custody proceeding:

> Three interests are involved in all questions touching the custody of children, those of the child, of the parents and of the State. In determining disputes as to the custody of children, the court acts as parens patriae and regards the welfare of the child as the controlling consideration. The interest of society and the established policy of the law make the welfare of the child paramount to the claims of the parent, and the welfare of the child is the most controlling of the three interest, since, upon its proper determination, the other two are a great degree dependent (Citations omitted).

7. In Gilchrist v. Gilchrist, 75 N.E.2d 417 (Ind. 1947), the Indian Supreme Court noted that a parent's right to custody is not absolute:

> The rights of parents, however, are not absolute. They most yield to the welfare of the child. It's welfare and best interest are the paramount and controlling considerations in all disputes over the custody of a child. The disposition of

children is not controlled by hard and fast rules of law but by the exercise of the sound judicial discretion of the court confronted with the problem.

8. The Court does not find that the provisions of I.C. 31-17-2-8, I.C. 31-17-2-13, or I.C. 31-17-2-14, are unconstitutional, and Respondent's Motion For Modification Of Parental Responsibilities And Rights And Parenting Time, is denied.

Dated: 12-3-03
Signed: Thomas P. Boyer, Special Judge, Allen Circuit Court

Copies to: Daniel L. Lauer, 7
Richard Eichinger, 13820 Hammerhill Way, Fort Wayne, IN 46845

Date of Notice: 12/05/03
Initials of person giving notice: DB

**D** U.S. Constitution: Fourteenth Amendment

**Fourteenth Amendment** - Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection

Amendment Text
Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**E** Constitution of the State of Indiana

Article 1 Bill of Rights
**Section 1. Inherent rights**
Section 1. WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the People have, at all times, an indefeasible right to alter and reform their government. (History: As Amended November 6, 1984).

**F** Constitution of the State of Indiana

Article 1 Bill of Rights
**Section 23. Equal privileges and immunities**
Section 23. The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.

**G** Indiana Code statute: **IC 31-17-2-8**

**Custody order**

Sec. 8. The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following:
(1) The age and sex of the child.
(2) The wishes of the child's parent or parents.
(3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
(4) The interaction and interrelationship of the child with:
(A) the child's parent or parents;
(B) the child's sibling; and
(C) any other person who may significantly affect the child's best interests.
(5) The child's adjustment to the child's:
(A) home;
(B) school; and
(C) community.
(6) The mental and physical health of all individuals involved.
(7) Evidence of a pattern of domestic or family violence by either parent.
(8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.
*As added by P.L.1-1997, SEC.9. Amended by P.L.96-1999, SEC.7; P.L.133-2002, SEC.32.*

**H** Indiana Code statute: **IC 31-17-2-13**

**Joint legal custody; finding required for award**

Sec. 13. The court may award legal custody of a child jointly if the court finds that an award of joint legal custody would be in the best interest of the child. *As added by P.L.1-1997, SEC.9.*

**I** Indiana Code statute: **IC 31-17-2-14**

**Joint legal custody; division of physical custody**

Sec. 14. An award of joint legal custody under section 13 of this chapter does not require an equal division of physical custody of the child. *As added by P.L.1-1997, SEC.9.*

**J** Indiana Code statute: **IC 31-17-2-15**

**Joint legal custody; matters considered in making award**

Sec. 15. In determining whether an award of joint legal custody under section 13 of this chapter would be in the best interest of the child, the court shall consider it a matter of primary, but not determinative, importance that the persons awarded joint custody have agreed to an award of joint legal custody. The court shall also consider:
(1) the fitness and suitability of each of the persons awarded joint custody;
(2) whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare;

(3) the wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age; and

(4) whether the child has established a close and beneficial relationship with both of the persons awarded joint custody;

(5) whether the persons awarded joint custody:

(A) live in close proximity to each other; and

(B) plan to continue to do so; and

(6) the nature of the physical and emotional environment in the home of each of the persons awarded joint custody.

*As added by P.L.1-1997, SEC.9.*